TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 911

No. [redacted] 66

THE UNITED STATES ON THE RELATION OF MARY S. NESS, PLAINTIFF IN ERROR,

vs.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 9, 1909.

(21,718.)

(21,718.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 243.

THE UNITED STATES ON THE RELATION OF MARY S. NESS, PLAINTIFF IN ERROR,

vs.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 In the Court of Appeals of the District of Columbia.

No. 1984.

JAMES RUDOLPH GARFIELD, Secretary of the Interior, Appellant,
vs.
THE UNITED STATES on the Relation of MARY S. NESS.

Supreme Court of the District of Columbia.

No. 51107. At Law.

THE UNITED STATES on the Relation of MARY S. NESS, Petitioner,
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Petition for Mandamus.

Filed November 13, 1908.

In the Supreme Court of the District of Columbia.

No. 51107.

THE UNITED STATES on the Relation of MARY S. NESS
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior.

To the Supreme Court of the District of Columbia:

The petition of Mary S. Ness respectfully states:

I. That the petitioner is a resident of Lane County, State of Oregon, and a citizen of the United States of America.

II. That on the 13th day of December, 1907, petitioner filed in the United States local land office at Roseburg, Oregon, a
2 timber and stone application under the act of Congress approved June 3, 1878 (20 Stats., 89), for the N. W.^{4} of the N. E.^{4}, N.^{2} of the N. W.^{4} and S. W.^{4} of N. W.^{4} of Sec. 14, T. 23 S., R. 2 W., situated within said district; that accompanying said application she filed therewith her affidavit showing that she was duly qualified as an applicant for said tract under said act of Congress, and that according to her information and belief the said land was

non-mineral, unfit for cultivation, chiefly valuable for its timber, not inhabited or covered by any bona fide improvement or by a mining location; that she had not personally examined the land herself because she was physically unable to do so, and furthermore would not have understood its character even if she had done so, but that she had employed an expert woodsman to examine it for her.

III. That petitioner filed with this application on the same day and requested it to be considered, also her own affidavit, the affidavit of one Clark P. Deavreux, to the effect that as agent for the applicant he had made a thorough personal examination of the land applied for, that he was an expert woodsman and understood the character and value of timber lands, that these particular tracts were unfit for cultivation, chiefly valuable for their timber, uninhabited, containing no mining or other improvements, and no valuable deposit of mineral or coal, and that affiant had no interest in the application aforesaid.

IV. That on the same day said application was filed, December 13, 1907, the Register and Receiver of the said local land office rejected said application subject to appeal, for the sole and only reason that "applicant has not personally examined the land."

V. That within the time allowed for appeal, and on December 28, 1907, petitioner filed her appeal from said decision to the United States General Land Office at Washington, accompanying same by a brief setting forth the decision rendered on June 25, 1901, by the United States Circuit Court of Appeals for the 7th Circuit in the case of Hoover vs. Salling (110 Fed. Rep., page 43), which decision held that it was unnecessary under the act of June 3, 1878, for an applicant for public land to have personally inspected the land and that the regulation of the Interior Department requiring such personal inspection would defeat one of the main purposes of the said act of Congress and would deprive the applicant of one of her rights under the law; and in said brief petitioner also invited attention to the decision of the United States Supreme Court in the case of Morrill vs. Jones (106 U. S., 466).

VI. That on the 16th day of March, 1908, the Assistant Commissioner of the General Land Office considered petitioner's said appeal from said decision and affirmed the same, subject to the right of further appeal, without any reference whatsoever to the Federal Court decision relied upon in said appeal, and above referred to.

VII. That within the time allowed for appeal and on March 24, 1908, petitioner filed an appeal from said decision of the General Land Office to the Secretary of the Interior, relying again on the Federal Court decisions above referred to.

3 VIII. That on the 20th day of April, 1908, the respondent herein, James Rudolph Garfield, as the Secretary of the Interior, considered petitioner's said appeal from the General Land Office decision and affirmed the same.

IX. That within the time allowed therefor under the rules of the Interior Department, and on July 1, 1908, petitioner filed a motion for review of the said Secretary's decision, accompanied by an affidavit to the effect that said motion was filed in good faith and not

for the purpose of delay, and referred again to the Federal Court decisions above mentioned. But that on the 6th day of August, 1908, the Interior Department, through its First Assistant Secretary, denied such motion for review and in its decision ruled that while the opinion of the United States Circuit Court of Appeals for the 7th Circuit in the case of Hoover vs. Salling (supra), was "highly persuasive," it would not be accepted by the Department as authority for changing the requirement of the Department that a timber and stone applicant shall have first personally inspected the land applied for before filing her application.

X. That on the 20th day of August, 1908, the General Land Office promulgated said last mentioned decision of the Interior Department and finally rejected petitioner's said application for said land.

XI. That said tracts of land above described were of the character subject to entry under the said act of Congress approved June 3, 1878, and that petitioner was duly qualified to make entry thereof under said act, and is so qualified at the present time.

XII. That by reason of the great distance between petitioner's home and the said tracts of land, the inaccessibility thereof, the dense amount of underbrush necessary to be passed to reach said land, the lack of any wagon road leading thereto, petitioner's sex and physical weakness, and the fact that petitioner was and is encumbered with a small baby, it was at the time of her said application physically impossible for her to have personally inspected the said land. We accordingly submit that if the said regulation of the Interior Department is insisted upon it will result in depriving petitioner of a substantial right given her by the act of Congress above mentioned.

XIII. That petitioner has no knowledge concerning the relative value of land for agriculture and timber purposes, and therefore even if she had personally inspected the land prior to her said application, she would have been unable to swear as to the character thereof of her own personal knowledge.

XIV. That petitioner's application was presented for her own benefit, and not in the interest of her husband or her agent Deavreux, or any other person or corporation whatsoever; that she owns in her own right a sufficient amount of money to pay the government purchase price of said land and of expenses connected therewith; that the title to the land if she secures the same will inure to her own personal benefit.

XV. Petitioner further avers that it was the plain, unqualified, absolute and peremptory duty of said Secretary of the Interior, by virtue of his official position, to order the acceptance of said application and affidavits of petitioner, and the allowance of entry
4 thereon, after publication had been made and proof submitted, as required by the said act of June 3, 1878; and that notwithstanding the petitioner's right to such acceptance, said Secretary of the Interior has wrongfully and in violation of law, and in disregard of the said right of the petitioner, neglected, failed and refused to order such acceptance, and that the said Secretary of the Interior—although a demand has been made upon him by the petitioner herein to accept such application—still neglects, fails and re-

fuses to recognize the right of petitioner and to accept the said application.

XVI. The record before the Interior Department having shown and the fact being, that the conditions prescribed by Congress under the act of June 3, 1878, had been sworn to by petitioner from information and belief, and had been sworn to by her agent from personal knowledge, it was not competent for the said Secretary of the Interior to reject the application of petitioner, nor to direct cancellation thereof, solely because she had not personally examined the land prior to making it, nor to overrule the motion presented by petitioner for a review of the said decision of April 20, 1908.

XVII. Petitioner further avers that it was the plain, unqualified, absolute and peremptory duty of the said Secretary of the Interior, by virtue of his official position to follow the said decision of the United States Circuit Court of Appeals for the 7th Circuit in the case of Hoover vs. Salling (supra), and to have directed the acceptance of petitioner's application when same was found to be in full conformity with said Federal Court decisions.

Petitioner therefore prays that a writ of mandamus may issue to the said James Rudolph Garfield, Secretary of the Interior, commanding him to grant a review of the said decision of April 20, 1908, and commanding him to accept the said application of petitioner for the above described land, and to direct the local land office at Roseburg, Oregon, to place such application of record, after proper publication has been made and proper proof submitted; or

That a rule on the said James Rudolph Garfield, Secretary of the Interior, as aforesaid, may be granted to show cause why a writ of mandamus should not issue for the purposes aforesaid. And your petitioner will ever pray.

SAMUEL HERRICK,
Attorney for Petitioner.

STATE OF OREGON,
County of Lane, ss:

Be it remembered on this 20 day of October, 1908, before the subscriber, a United States Commissioner, personally appeared Mary S. Ness, who being duly sworn deposes and says:

That she has read the foregoing petition and know- its contents and the facts therein stated as of her own knowledge are true, and those stated on information and belief she believes to be true.

MARY S. NESS.

5 Subscribed and sworn to before me this 20 day of Oct., 1908.

[SEAL.] W. W. CALKINS,
U. S. Commissioner, Eugene, Oregon.

Rule to Show Cause.

Filed November 13, 1908.

In the Supreme Court of the District of Columbia.

At Law. 51107.

THE UNITED STATES on the Relation of MARY S. NESS
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior.

Upon reading and considering the petition of Mary S. Ness, filed in the above entitled case, it is ordered by the court this 13th day of November 1908, that James Rudolph Garfield, Secretary of the Interior, show cause on the 4th day of December, 1908, at 10 a. m., — shall not be issued by this court requiring said James Rudolph Garfield, as Secretary of the Interior, to accept the timber and stone application of petitioner, therein referred to, for the N. W.¼ of the N. E.¼, N.½ of the N. W.¼ and S. W.¼ of N. W.¼ of Sec. 14, T. 23 S., R. 2 W., State of Oregon, and to direct the local land office at Roseburg, Oregon to place such application of record, after proper publication has been made and proper proof submitted; according to the prayer of said petitioner: provided, that a copy of this order be served on the respondent on or prior to the 16th day of November, 1908.

HARRY M. CLABAUGH,
Chief Justice.

Marshal's Return.

Served copy of the within order on James Rudolph Garfield, Secretary of the Interior, personally.
Nov. 13, 1908.

AULICK PALMER, *Marshal.*
H.

Answer.

Filed November 25, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 51107.

THE UNITED STATES on the Relation of MARY S. NESS
v.
JAMES RUDOLPH GARFIELD, Secretary of the Interior.

The respondent, James Rudolph Garfield, Secretary of the Interior, first reserving all benefit of any exception to the uncertainties

and defects of the petition herein filed, lack of proper parties, and to the lack of jurisdiction of this Court over him to grant a
6 writ of mandamus to compel the performance by him of duties involving the exercise of judgment and discretion, such as the acts sought to have him compelled to perform herein, nevertheless, for answer to said rule and to said petition, answering says:

1. He has no knowledge of the allegations of the first paragraph of said petition.

2. He admits that on the 13th day of December, 1907, relator filed in the United States land office at Roseburg, Oregon, a timber and stone application under the act of Congress approved June 3, 1878 (20 Stat., 89), to make purchase of the N. W. ¼ of N. E. ¼, N. ½ N. W. ¼ and S. W. ¼ N. W. ¼, Sec. 14, T. 23 S., R. 2 W., situated within the said district, and that accompanying said application she filed an affidavit as to her qualifications to make the application in which it was stated that according to her information and belief the lands applied for were non-mineral, unfit for cultivation, chiefly valuable for timber, not inhabited or covered by any bona fide improvement, or by any mining claim, and, further, that she had not personally examined the land because she was physically unable to do so and, furthermore, would not have understood its character even if she had done so, but that she had employed an expert woodsman to examine it for her; but as to whether she possessed the qualifications necessary to entitle her to make the application, or whether the land was of the character or condition subject to disposal under said act of 1878, has not been considered by the land department charged with the administration of the act and the disposal of the public lands, for the reason hereinafter given.

3. He admits the allegations of the third paragraph of the petition.

4. He admits the allegations of the fourth paragraph of the petition.

5. He admits the allegations of the fifth paragraph of the petition.

6. He admits the allegations of the sixth paragraph of the petition.

7. He admits the allegations of the seventh paragraph of the petition.

8. He admits the allegations of the eighth paragraph of the petition.

9. He admits the allegations of the ninth paragraph of the petition.

10. He admits the allegations of the tenth paragraph of the petition.

11. He neither admits nor denies the allegations of the eleventh paragraph of the petition for the reason that he has no personal knowledge of the allegations contained therein.

12. He neither admits nor denies the allegations of the twelfth paragraph of the petition for the reason that he has no personal knowledge of the allegations contained therein.

13. He neither admits nor denies the allegations of the thirteenth

paragraph of the petition for the reason that he has no per-
7 sonal knowledge of the allegations contained therein.

14. He neither admits nor denies the allegations of the fourteenth paragraph of the petition for the reason that he has no personal knowledge of the allegations contained therein.

15. He admits that he refused to accept the relator's application to make purchase under the timber and stone act of the tract hereinbefore described, as hereinbefore stated, for the reason that the relator in her affidavit accompanying her said application stated that she had not personally examined the land which personal examination, in the opinion of the land department, is a statutory requirement and can not be dispensed with; that such has been the uniform holding of the land department since the passage of the act of 1878, and that he therefore denies that it was his plain, unqualified, absolute and peremptory duty to accept relator's application, as alleged in paragraph fifteen of the petition.

16 and 17. Answering the allegations of the sixteenth and seventeenth paragraphs of the petition he states that he is informed that they present no question of fact but rather conclusions of law, and, so far as he is advised, denies the allegations contained in said paragraphs.

Furthermore, and more fully answering the said rule, respondent states that the relator tendered her timber and stone application under the act of June 3, 1878, and in her affidavit required to be filed therewith stated explicitly that she had not made a personal examination of the land applied for; that in the administration of said act of 1878 the land department has uniformly construed its provisions as requiring the applicant to allege in his sworn statement, and of his own personal knowledge, that the land applied for is of a certain character and in a certain condition as particularly required by said act (see Circular of May 21, 1887, 6 L. D., 114; Case of I. Walker, 11 L. D., 599; Grace v. Carpenter, 14 L. D., 436; Strum v. Taylor, 22 L. D., 719; Teresa McManus, 29 L. D., 657), because it is obvious that such knowledge can be acquired only by the applicant's going on or to the land and making a personal inspection thereof, and it was because of her failure to make the required affidavit as to such personal examination of the land that her application was successively denied by the local office December 31, 1907, upon appeal, by the Commissioner of the General Land Office in his decision of March 6, 1908, upon further appeal, by the Secretary of the Interior in his decision of April 20, 1908, and, upon review, in his decision of August 6, 1908, as will more fully appear from certified copies of said several decision- which are hereto appended marked "Exhibits A, B, C, and D," and made part of this answer.

Because of such failure to make the required affidavit no further consideration was given relator's application respecting her personal qualifications or of her showing respecting the condition and character of the land applied for.

8 Respondent, further answering, advises the Court that since the final action upon the relator's application, to wit, on September 2, 1908, one William A. Taylor filed in the local land office

at Roseburg, Oregon, his sworn statement preliminary to the purchase of the tract here in question, under the act of June 3, 1878, which appeared to the local officers to be regular and proper, and for that reason notice was issued to him for publication preliminary to the making of proof and payment for the land under the statute, and that February 23, 1909, was fixed in the notice for publication as the date upon which such proof is to be submitted, and that any decree that may be entered herein will necessarily affect the interests of said William A. Taylor under his said application, and, as a consequence, he is a necessary party to any proceeding by which his rights may be thus materially affected, and it is therefore respectfully submitted that this Court has no jurisdiction in proceedings for mandamus to consider the claims of the petitioner or to try out any question of his claim or right to lands where there are other outstanding rights or claims to the land, legal or equitable, of other persons.

Respondent, further answering, respectfully suggests to this honorable Court that all matters affecting the sale and disposal of the public lands are by law placed exclusively within the jurisdiction of the respondent and the land department, and that the consideration and determination of the question as to whether an applicant for the public lands has complied with the requirements of law and the regulations involve the exercise of judgment and discretion, and to require of the respondent that he accept relator's application for the tract of land hereinbefore described and necessarily to cancel and reject all other claims in conflict therewith, is not a mere ministerial act or duty, and if he were obliged to comply with the prayer of the relator he would be compelled to disregard the law as it has been construed by the Secretary of the Interior, the head of the land department, in the exercise of his discretion as the head of a coordinate department of the Government, in a matter falling within the jurisdiction of that Department.

Respondent, further answering, finally states that the real object of this proceeding is an attempt to invest this Court with appellate jurisdiction to secure a review and reversal of the several decisions of the land department upon matters by law placed exclusively within the jurisdiction of that Department.

JAMES RUDOLPH GARFIELD.

DISTRICT OF COLUMBIA, *ss:*

James Rudolph Garfield, being first duly sworn, says that he has read over the foregoing answer by him subscribed and noted the contents thereof; that the matters and things therein set out on information and belief he believes to be true.

JAMES RUDOLPH GARFIELD.

9 Subscribed and sworn to before me this 24 day of Nov., 1908.

[SEAL.] W. BERTRAND ACKER,
Notary Public in & for D. C.

Certification.

Filed November 25, 1908.

B. M. F. H.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 14, 1908.

I hereby certify that the annexed copies of Register's decision dated Dec. 31, 1907, Commissioner's decision dated March 16, 1908, and Secretary's decisions dated April 20, 1908, and August 6, 1908, are true and literal exemplifications of the originals and press copy of Commissioner's decision in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

"A."

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
ROSEBURG, ORE., *Dec.* 31, 1907.

The Honorable Commissioner, General Land Office, Washington, D. C.

SIR: On December 13, 1907, Mary S. Ness filed timber and stone sworn statement for the N. W. ¼ N. E. ¼, N. ½ N. W. ¼, S. W. ¼ N. W. ¼, Sec. 14, T. 23 S., R. 2 W., which was rejected same day because said sworn statement showed that the applicant had not personally examined the land she applied for but filed with her application the affidavit of one Clark P. Devereaux whom she had employed to examine the land for her. Thirty days from notice of rejection were allowed in which to appeal. Appeal is filed and also the appointment of Walton & Ness, of Eugene, Ore., as attorneys for the applicant. These are transmitted herewith for your consideration together with proof of service of notice and all the papers in said application.

We would also state that the prior application by the State of Oregon for the same land, referred to in the notice of rejection, was withdrawn on the 19th inst.

Very respectfully, BENJ. L. EDDY, *Register.*

10 (Endorsed:) 3086 Received G. L. O. Jan. 7 1908. United States Land Office, Roseburg, Ore., Dec. 31,/07. Registers transmit appeal of Mary S. Ness from rejection of timber application, involving the N. W. ¼ N. E. ¼, N. ½ N. W. ¼, S. W. ¼ N.

W. ¼ of Sec. 14 to. 23 S., R. 2 W. Reference is hand to letter affirmed Mch. 16, 1908 D. C. S. To Dept. on appeal 4-7-08. Decis. Promulg. Apr. 27, 1908. Dept. on review July 25, 1908. Closed Aug. 20, 1908. Noted in "O" 9-2/08. F. H. C.

"B."

"C." 08-3086. D. C. S.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 16, 1908.

Address only the Commissioner of the General Land Office.

MARY S. NESS. Appeal. Action of Local Office Affirmed.

Register and Receiver, Roseburg, Oregon.

GENTLEMEN: On December 31, 1907, you forwarded the appeal of Mary S. Ness from the decision of your office rendered December 13, 1907, rejecting her application, filed on that date, to purchase under the act of June 3, 1878 (20 Stat., 89), the N. W. ¼ N. E. ¼, N. ½ N. W. ¼, S. W. ¼ N. W. ¼ Sec. 14, T. 23 S., R. 2 W., for the reason that the sworn statement showed that the applicant had not personally examined the land she applied for, but was accompanied by the affidavit of one Clark P. Devereaux, whom she had employed to examine the land for her.

In her application she states:

That I am unable to personally examine the same, and would not understand its character if I did so, but that I have had an expert woodsman to examine it for me as my agent.

Rule 8, page 41, circular of January 25, 1904, requires the sworn statement required as above (section 2 of the act) must be made upon the personal knowledge of applicant, except in the particulars in which the statute provides that the affidavit may be made upon information and belief See 32 L. D., 631.

In view thereof, your action is this day affirmed, and you will so advise the party, using form 4-485, and in due time report your action hereunder.

Very respectfully, S. V. PROUDFIT,
Assistant Commissioner.

BOARD OF LAW REVIEW.
By J. H. THOMAS.

11 "C."

Registered, G. L. O., Ap'l 22, 1908.
D. C. H.
C. J. C.
J. W. S.

M. T.
D-3483.
G. W. W.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *April* 20, 1908.

In re MARY S. NESS.

Appeal from Rejection of Timber and Stone Application. Affirmed.

The Commissioner of the General Land Office.

SIR: An appeal has been filed by Mary S. Ness from the decision of your office of March 16, 1908, rejecting her application to purchase under the act of June 3, 1878 (20 Stat., 89), the N. W. ¼ N. E. ¼, N. ½ N. W. ¼, S. W. ¼ N. W. ¼ Sec. 14, T. 23 S., R. 2 W., Roseburg, Oregon, for the reason the sworn statement filed by the applicant showed that she had not made a personal examination of the land embraced in her application to purchase but was merely accompanied by the affidavit of one whom she had employed to examine the land for her.

Under the construction placed by the Department upon the timber and stone act and in its regulations, the sworn statement required to be filed by an applicant under s[illegible] must in the particular referred to be made upon his or her person[illegible]nowledge. The decision of your office was therefore proper and is hereby affirmed. The papers are herewith.

Very respectfully,

JAMES RUDOLPH GARFIELD, *Secretary*.

"D."

W. S. A.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *August* 6, 1908.

D. C. H.
P. E. W.
W. C. P.

EX PARTE MARY S. NESS.

Review Denied. Roseburg T. & S. Application. "C." '08. 3086.

The Commissioner of the General Land Office.

SIR: Counsel for Mary S. Ness has filed a motion for a review of the departmental decision of April 20, 1908, affirming your office decision of March 16, 1908, wherein you affirmed that of the local officers and rejected her application to purchase, under the act of June 3, 1878 (20 Stats. 89), the N. W. ¼ N. E. ¼, N. ½ N. W. ¼, S. W. ¼, N. W. ¼ Sec. 14, T. 23 S., R. 2 W., Roseburg, Oregon.

The rejection was upon the ground that the sworn state-
12 ment shows that the applicant had not personally examined the land applied for. The motion relies upon the decision rendered June 25, 1901, by the Circuit Court of Appeals for the Seventh Circuit in the case of Hoover vs. Salling (110 Fed. Rep., 43).

In the case of Grace P. Featherstone, (32 L. D., 631, 632), it is stated concerning said decision:

The Department has heretofore carefully considered the decision cited by appellant wherein it is held that an applicant under said act is not required to make a personal inspection of the land applied for before filing his initial statement, said decision, however, while highly persuasive has not been accepted as authority for changing the requirement of the Department in this respect.

The allegations as to the character and the condition of such land, based on the personal knowledge of the ap-licant, being in the opinion of the Department a statutory requirement it cannot therefore permit the same to be dispensed with, notwithstanding the fact that the enforcement of said requirement may, in some cases, preclude the applicant, situated as is the applicant in the case at bar with reference to the land involved, from making timber and stone entry of a certain desired tract.

No er-or being shown and none otherwise appearing, the motion is overruled.

The papers in the case are herewith returned.

Very respectfully, FRANK PIERCE,
First Assistant Secretary.

Demurrer.

Filed December 2, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 51107.

UNITED STATES on the Relation of MARY S. NESS
v.
JAMES RUDOLPH GARFIELD, Secretary of the Interior.

The Relator, Mary S. Ness, says that the answer and return of the respondent is bad in substance.

SAMUEL HERRICK,
Attorney for Relator.

One of the matters of law intended to be argued is that the rejection of the timber and stone application of the Relator covering the land in controversy solely because she had not personally examined said land, and the refusal to follow the decision of the United States

Circuit Court of Appeals, are not matters solely within the
13 judgment and discretion of the respondent as Secretary of the Interior.

SAMUEL HERRICK.
Attorney for Relator.

Supreme Court of the District of Columbia.

FRIDAY, *December 11th*, 1908.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, Presiding.

* * * * * * *

No. 51107. At Law.

THE UNITED STATES on the Relation of MARY S. NESS, Petitioner,
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

This cause came on for hearing upon the Petition, the Rule to Show Cause issued thereon, the Answer of Respondent and Demurrer thereto and after argument by attorneys for the respective parties herein, was submitted to the Court. Thereupon, upon consideration thereof, it is ordered that said demurrer be, and the same is hereby sustained; that the prayers of said petition be, and hereby are granted, and that the peremptory writ of Mandamus, issue herein, as prayed.

Further that petitioner recover of respondent her costs of suit to be taxed by the Clerk, and have execution thereof.

MONDAY, *December 14th*, 1908.

Session resumed, pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

No. 51107. At Law.

THE UNITED STATES on the Relation of MARY S. NESS, Petitioner,
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

Comes now the respondent by his attorney and in open Court notes an appeal herein from the judgment to the Court of Appeals.

14 *Notice of Taking Appeal by Direction of Attorney-General, &c.*

Filed December 14, 1908.

In the Supreme Court of the District of Columbia, the Fourteenth Day of December, 1908.

At Law. 51107.

UNITED STATES ex Rel. MARY S. NESS
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior.

The Clerk of said Court will please take notice that the appeal taken herein in open court this the 14th day of December, 1908, from the judgment of the Court in the above entitled case, awarding the writ of mandamus against respondent as prayed in the petition, was prayed and taken by direction of the Attorney General of the United States and of the Secretary of the Interior, and the case is to be treated as an United States case.

DANIEL W. BAKER, *U. S. Att'y.*
GEORGE W. WOODRUFF,
Ass't Att'y Gen. Interior Dept.

Directions to Clerk for Preparation of Transcript of Record.

Filed December 28, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 51107.

UNITED STATES ex Rel. MARY S. NESS, Relator,
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

The following pleadings and papers are hereby designated by counsel for respondent as the record to be made and filed in the Court of Appeals for the District of Columbia in the appeal prayed and taken herein from the judgment of the Supreme Court of the District of Columbia, under date of December 14, A. D. 1908, sustaining the demurrer to the answer and directing the writ to issue:

1st. The petition for the writ of mandamus, with exhibits.
2nd. The rule to show cause.
3rd. The respondent's answer to said rule, with exhibits.
4th. The demurrer to said answer.
15 5th. The order sustaining the demurrer, and directing the writ to issue.

6th. The praying of appeal by respondent and the suggestion that the appeal was taken by the direction of the heads of the departments of the United States and is, and is to be treated as, an United States case.

7th. This designation.

DANIEL W. BAKER,
United States Attorney.
GEORGE W. WOODRUFF,
Assistant Attorney-General.

Service of copy of above accepted this 28th day of December A. D. 1908.

SAMUEL HERRICK,
Att'y for Appellee.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 29, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51107 at Law, wherein The United States on the relation of Mary S. Ness is Petitioner, and James Rudolph Garfield, Secretary of the Interior, is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 15th day of January, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1984. James Rudolph Garfield, Secretary of the Interior, appellant, vs. The United States on the Relation of Mary S. Ness. Court of Appeals, District of Columbia. Filed Jan. 29, 1909. Henry W. Hodges, Clerk.

16 TUESDAY, *April 6th, A. D.* 1909.

No. 1984.

JAMES RUDOLPH GARFIELD, Secretary of the Interior, Appellant,
vs.
THE UNITED STATES on the Relation of MARY S. NESS.

The retirement of James Rudolph Garfield and the appointment of Richard A. Ballinger as Secretary of the Interior having been suggested, It is upon motion of Mr. F. W. Clements, of counsel for the appellant, now here ordered by the Court that the said Richard A. Ballinger, Secretary of the Interior, be, and he is hereby, made the party appellant in this cause in the place and stead of James Rudolph Garfield, retired.

No. 1984.

RICHARD A. BALLINGER, Secretary of the Interior, Appellant,
vs.
THE UNITED STATES on the Relation of MARY S. NESS.

The argument in the above entitled cause was commenced by Mr. F. W. Clements, attorney for the appellant, and was continued by Mr. Samuel Herrick, attorney for the appellee, and was concluded by Mr. Oscar Lawless, attorney for the appellant. On motion the appellee is allowed to file brief and the appellant to file additional authorities herein if so advised.

17 No. 1984.

RICHARD A. BALLINGER, Secretary of the Interior, Appellant,
vs.
THE UNITED STATES on the Relation of MARY S. NESS.

Opinion.

Mr. Chief Justice SHEPARD delivered the opinion of the Court:

The relator petitioned the Supreme Court of the District for a writ of mandamus to compel James R. Garfield, then Secretary of the Interior, to accept an application made by her for the purchase of a parcel of the public land, under the "Timber and Stone Act." Demurrer to the respondent's return to the notice to show cause was sustained, and the writ ordered to issue. From this order Secretary Garfield appealed. Having retired from office, his successor Richard A. Ballinger has been substituted as appellant.

The following facts are established by the allegations and admission of the pleadings: On December 13, 1907, Mary S. Ness filed in the United States Land Office at Roseburg, Oregon, an application for the purchase of certain parts of a section of land in that district,

under the provisions of the act of June 3, 1878. The affidavit accompanying said application is not made an exhibit to the petition, but is described as follows: "Showing that she was duly qualified as an applicant for said tract under said act of Congress, and that according to her information and belief the said land was nonmineral, unfit for cultivation, chiefly valuable for its timber, not inhabited or covered by any bona fide improvement or by a mining location; that she had not personally examined the land herself because she was physically unable to do so, and furthermore would not have understood its character even if she had done so, but that she had employed an expert woodsman to examine it for her."

On the same day, she filed the affidavit of Clark P. Devereaux, to the effect that he was the agent of the applicant, an expert woodsman, and understood the character and value of timber lands; and that the lands described were unfit for cultivation, chiefly valuable for their timber, containing no mining or other improvements; and no valuable deposit of mineral or coal, and that affiant had no interest in the application. The register and receiver of the local land office rejected the application for the sole reason as stated, that "applicant has not personally examined the land."

On appeal to the Commissioner of the General Land Office the rejection was affirmed. The Secretary, on appeal to him, affirmed the decision of the Commissioner, and, on August 20, 1908, entered a final order rejecting the said application.

The return of the Secretary avers that the requirement that an applicant shall make affidavit to personal examination of the land is statutory and can not be dispensed with; and that this has been the construction of the statute uniformly maintained in its enforcement. This construction is embodied in the regulations of the Secretary of the Interior on July 16, 1878, issued for the instruction of the local land officials in administering said statute.

The act of Congress approved June 3, 1878 (20 Stat., 89), provides in section 1 for the sale of not exceeding one hundred and sixty acres of public land, unfit for cultivation and valuable chiefly for timber and stone.

Sections 2 and 3 read as follows:

"SEC. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes where any such do exist, save such as were made by or belonged to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not directly or indirectly, made any agreement or contract in any way or manner with any person or persons what-

soever by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

18 "SEC. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May 10, 1872, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office."

Among the regulations prescribed by the land department immediately after the passage of the act is one which requires the applicant to make the following sworn statement: "I have personally examined said land and from my personal knowledge state that said land is unfit for cultivation and valuable chiefly for its timber." A further regulation of May 21, 1887, requires that the sworn statement shall be made upon personal knowledge of the applicant, except in particulars in which the statute provides that the affidavit may be upon information and belief.

1. Responding, first, to the persistent pressing of the question of jurisdiction to review the action of the head of an executive depart-

ment, it is sufficient to say that this is not the case of one seeking to establish a title to lands as against the United States, but of one seeking to compel the performance of a ministerial duty imposed upon the officer by the terms of a statute. The duty, if such, does not cease to be ministerial because it requires, in some degree, the construction of the language of a statute. Roberts v. Valentine, 13 App. D. C., 38, 46; Roberts v. U. S., 176 U. S., 221, 231.

2. In legislation of this kind requiring the performance of administrative duties by the head of a department to put it in execution, it is usual, as was done in the foregoing statute, to confer the power to make appropriate regulations for carrying the same into effect. Such supplementary regulations have all the force of law if not in conflict with the law itself, or in plain excess of its requirements. The officer is not authorized to make the law, but to prescribe reasonable regulations for its effective administration, not inconsistent therewith or in addition thereto. In re Kollock, 165 U. S., 526, 533, and cases there cited; Davis v. Moss, 167 U. S., 43, 48; Williamson v. U. S., 207 U. S., 425, 462.

The construction of a statute by the department charged with its administration, early made and uniformly followed for a number of years, is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. U. S. v. Moore, 95 U. S., 760, 763; Hastings v. R. R. Co., 132 U. S., 357, 366; U. S. v. Finnell, 185 U. S., 236, 244, and cases there cited.

3. After a careful consideration of the provisions of this statute, we are not prepared to say that the regulations of the department are in conflict therewith, or that the action of the Secretary in rejecting the application is founded on an erroneous construction of its language. While extending its benefits to all citizens of the United States and persons who have taken the necessary steps to become such, without regard to residence, the statute expressly requires that the oath shall be made in person before the local officer of the district in which the land lies, and seems to contemplate that it shall, in part, be made upon actual, personal knowledge. The necessary facts, that the land shall be unoccupied, unfit for cultivation, and chiefly valuable for timber and stone are capable of exact and certain statement after its inspection. Whether there may be mineral deposits in the land is a fact that the average applicant would not, ordinarily, be able to determine by going upon the land and making careful examination. Hence, while the first statement must be positive, as of actual knowledge, the second may be upon belief merely.

While it is true, as stated in a case relied on by the appellee, and which will be reviewed later, that the statute does not expressly provide that the verification of the application shall be upon personal knowledge only, yet that intention seems to be clearly implied. If not so intended, why the insertion of the provision that the fact as to the existence of mineral deposits may be stated upon belief? This was wholly unnecessary if it had been intended that the preceding facts might be stated as a matter of belief also. Moreover, the statute requires that the verification shall be made by the applicant in person. It can not be made in his name by an agent or attorney. Mar-

tin v. Martin & Bowne Co., 27 App. D. C., 59, 62. This requirement would be practically nugatory if the affidavit of necessary facts could be made solely upon information derived from an agent. That it was the intention that the necessary positive statement of facts should be upon the personal knowledge of the applicant, necessarily to be acquired by examining the land, seems to be confirmed by the last clause of section 2 which declares that if any person shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands and all right and title to the same. If the entire affidavit can be made upon information and belief, it is difficult to see how the pains and penalties of perjury could be visited upon the applicant.

If perjury could be maintained at all upon such an affidavit,
19 the question of guilt would depend not upon the falsity of the statement of the facts as to occupancy and unfitness for cultivation, but upon the falsity of the applicant's belief in the truth of the representations made to him in this regard by his agent or representative. It would be practically impossible to establish wilful and corrupt false swearing in such a case.

The construction given to the statute by the regulations of the land department has been upheld in the Circuit Court for the District of Oregon in a prosecution for perjury. U. S. v. Wood, 70 Fed. Rep., 485, 486. In that case it was said by Judge Bellinger: "It is competent under this statute for the proper officers of the Government, as a regulation in the sale of these lands, to require the affidavit of personal examination and personal knowledge on the part of the applicant. The oath required by the act of Congress providing for the sale of these lands contains two parts: One, that the land is unfit for cultivation, uninhabited, and unimproved; and the other, that to the best of the belief of the applicant, the land contains no valuable deposits of mineral, etc. This last must be made on information, but the first statement necessarily implies a personal knowledge of the land. The requirement of the department as to the affidavit of personal examination is in conformity with the requirement of the first part of the oath provided by the statute."

A different construction has been given in a later case by the Court of Appeals of the Seventh Circuit, upon which the appellee relies. Hoover v. Salling, 110 Fed. Rep., 43, 46.

That suit was against a defendant holding under a patent. Complainant alleged that she had made application for the land and made the preliminary oath in due form. That she had submitted the proof required by section 3 and tendered payment of the purchase price. That one Toole had made a later application and filed a protest against complainant's entry, alleging that she had never been upon, or seen the land or any part thereof. That the land department rejected complainant's application upon the ground that she had not complied with the regulation requiring a personal examination of the land, and issued the patent to Toole, under whom defendant held. A decree dismissing the bill was reversed. After reciting the procedure required by the statute, the court said: "It is clear to us, in view of this, that the statement is

meant simply as an initial paper—the claim or pleading—upon which the machinery of the land office is to be set in motion. The statement is not accepted as proof and it does not perform the office of proof; that must come at the hearing. It is in the nature of a petition to the land department, setting forth all the material facts upon which action is invoked, and is in this general respect analogous to verified petitions or bills in courts of chancery * * * Section 2 of the act provides that the statement shall be verified by oath, but it does not, in terms at least, provide that the verification shall be on the personal knowledge only, and shall not be upon information and belief. We think we should apply to this section of the statute the rule adopted in analogous pleadings where verification is required, and so doing we can not see why that portion of the statement relating to the character of the land—that it is uninhabited, is unfitted for cultivation, and valued chiefly for timber or stone—may not be predicated upon information and belief. Any other interpretation would, in our opinion, import into the procedure a restriction not to be found in the procedure of the courts in analogous inquiries, and would defeat one of the main purposes of the act."

With the greatest respect for the learned court, from whose opinion we have quoted, we are nevertheless constrained to say that we are not impressed with the soundness of its reasoning. We can not regard the presentation of the verified application as a mere initial paper in the form of a pleading setting forth facts thereafter to be established upon hearing. It is rather in the nature of "preliminary proof" as called in Williamson v. U. S. (207 U. S., p. 459). As indicated in that case, there are two stages of hearing, the preliminary one after which notice is published, and the second, or final one after publication. This preliminary proof is the essential step by which the applicant secures preemption. It is important as well as reasonable that such proof should be positive and direct in order to secure a preference over other applicants. While this proof is not made sufficient to warrant the issue of the patent, and must be followed by publication and supported by other satisfactory evidence that the land is of the character contemplated, that is to say, unoccupied, without improvements, unfit for cultivation, and valuable chiefly for timber or stone, it is sufficient as to other material facts, namely, that the application is made in good faith for the exclusive benefit of the applicant, and that he has not, directly or indirectly made any agreement or contract by which the title he might obtain should inure to the benefit of any other person than himself. As to these, the preliminary proof is all that is required by the statute, and the land department has no power to require more. Williamson v. U. S., 207 U. S., 425, 460.

We regard the analogy of the procedure under this statute as rather with those special statutory proceedings which are required to be supported by affidavit than with the ordinary procedure in accordance with the equity rules. In the procedure of the first kind providing for the issue of attachments, temporary injunctions, etc., the required affidavit may be separate, or by way of verification of initial pleading; but in either case, the facts must be alleged as within the

personal knowledge of the party, and not upon information and belief. City of Atchison v. Bartholow, 4 Kan., 104, 117; Thompson v. Higginbotham, 18 Kan., 42, 44; Dyer v. Flint, 21 Ill., 80, 85; Gawtry v. Doane, 51 N. Y., 84, 89; Neal v. Gordon, 60 Ga., 112, 114; Lewis v. Connolly, 29 Neb., 222, 224.

Our conclusion is that the regulation of the land department is not in conflict with or in excess of the power conferred by the statute. The judgment must, therefore, be reversed with costs and the cause remanded with direction to dismiss the petition.

Reversed.

20 TUESDAY, *April 20th, A. D.* 1909.

No. 1984. April Term, 1909.

RICHARD A. BALLINGER, Secretary of the Interior, Appellant,
vs.
THE UNITED STATES on the Relation of MARY S. NESS.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the said Supreme Court with direction to dismiss the petition.

Per Mr. CHIEF JUSTICE SHEPARD,
April 20, 1909.

21 FRIDAY, *May 14th, A. D.* 1909.

No. 1984.

RICHARD A. BALLINGER, Secretary of the Interior, Appellant,
vs.
THE UNITED STATES on the Relation of MARY S. NESS.

On motion of Mr. Samuel Herrick, attorney for the appellee, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

22 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals

before you, or some of you, between Richard A. Ballinger, Secretary of the Interior, Appellant, and The United States on the relation of Mary S. Ness, Appellee, a manifest error hath happened, to the great damage of the said Appellee as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of May, in the year of our Lord one thousand nine hundred and nine.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

23 (*Bond on Writ of Error.*)

Know all Men by these Presents, That we, Mary S. Ness, as principal, and the Massachusetts Bonding and Insurance Company, a Corporation of the State of Massachusetts, as surety, are held and firmly bound unto Richard A. Ballinger, Secretary of the Interior, in the full and just sum of Three Hundred Dollars ($300) to be paid to the said Richard A. Ballinger, Secretary of the Interior, — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 20th day of May, in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between Richard A. Ballinger, Secretary of the Interior, appellant, and the United States on the Relation of Mary S. Ness, appellee, a judgment was rendered against the said Mary S. Ness and the said Mary S. Ness having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Richard A. Ballinger, Secretary of the Interior citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Mary S. Ness shall prosecute said writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

MARY S. NESS, [SEAL.]
By SAMUEL HERRICK, *Attorney.* [SEAL.]
MASSACHUSETTS BONDING AND INSURANCE COMPANY. [SEAL.]
By LEE B. MOSHER, [SEAL.]
Attorney in Fact.

[Seal of Massachusetts Bonding and Insurance Company.]

O. K.
W. E. W.

Sealed and delivered in the presence of—

L. M. HOPKINS.
MYRON E. WEBSTER.

Approved by—

SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1984. Richard A. Ballinger, Secretary of the Interior, Appellant, vs. The United States on the Relation of Mary S. Ness. Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed May 21, 1909. Henry W. Hodges, Clerk.

24 UNITED STATES OF AMERICA, *ss:*

To Richard A. Ballinger, Secretary of the Interior, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The United States on the relation of Mary S. Ness, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 21st day of May, in the year of our Lord one thousand nine hundred and nine.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 21st day of May A. D. 1909.

R. A. BALLINGER,
Sec'y of the Interior.
F. W. CLEMENTS, *Att'y.*

[Endorsed:] Court of Appeals, District of Columbia. Filed May 21, 1909. Henry W. Hodges, Clerk.

25 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to — inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Richard A. Ballinger, Secretary of the Interior, Appellant, vs. The United States on the relation of Mary S. Ness, No. 1984, April Term, 1909, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 26th day of May A. D. 1909.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 21,718. District of Columbia Court of Appeals. Term No. 243. The United States on the relation of Mary S. Ness, plaintiff in error, vs. Richard A. Ballinger, Secretary of the Interior. Filed June 9th, 1909. File No. 21,718.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES ON THE RELATION OF Mary S. Ness, plaintiff in error.
vs.
WALTER L. FISHER, SECRETARY OF THE Interior.
No. 66.

BRIEF FOR THE DEFENDANT IN ERROR.

This is a proceeding in mandamus, begun in the Supreme Court of the District of Columbia for the purpose of compelling the Secretary of the Interior to receive the relator's application to file upon certain lands in Oregon under the timber and stone act. The text of the material portions of that act (approved June 3, 1878, ch. 151, 20 Stat., 89) is as follows:

> SEC. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its tim-

ber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

SEC. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office, shall post a notice of such application, embracing a description of the land by legal subdivi-

sions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided,* That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the

> officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

As appears by the pleadings, the relator (plaintiff in error here) tendered to the register and receiver, as in compliance with section 2 of the act, a statement, verified by herself, in which, however, she confessed that she had never visited the land in person, and sought to supply, by averments upon her information and belief and by a supporting affidavit of an agent who had given to the tract a personal inspection, the assurances which that section requires of the land's being unfit for cultivation, chiefly valuable for its timber, uninhabited, and free from mining or other improvements. In explanation of the tender of the additional affidavit, as well as of the want of any knowledge of the land upon the part of the relator, she alleged in her statement that it was physically impossible for her to go upon the land and examine it herself, and that even if she had done so she would not have been competent to judge of its character. These explanations, however, failed to satisfy the officials of the Land Department, which since the approval of the act has always held that personal knowledge of the land and direct statements of these things concerning its physical character and condition are required of the applicant himself.

Therefore the register and receiver refused the application, and this action was affirmed by the Commissioner of the General Land Office upon relator's appeal, and twice again by the Secretary of the Interior upon her second appeal and motion for rehearing. The record of the proceedings in the department annexed to the answer in this case (R., 9–11) shows that the filing was rejected only after repeated considerations of the merits of the claim, and not upon the arbitrary application of any rule or regulation. The relator then began this proceeding, which was heard upon her demurrer to the respondent's return. The trial court awarded the peremptory writ as prayed. (R., 13.) A writ of error was taken from the Court of Appeals, which reversed the case, directing that the petition be dismissed. (R., 22.) The opinion of the learned Court of Appeals, concurred in by all of the justices, will be found at page 16 of the record.

Two issues of law were considered and passed upon, the first concerning the power and jurisdiction of the court to entertain the proceeding without regard to whether the action of the Land Department was right or wrong under the statute, and the second involving a decision of the merits of the relator's rights under the statute and a construction of the statute itself. The Court of Appeals overruled the objections of respondent to the jurisdiction, but accepted the construction of the statute entertained by the department and upheld its action

upon the ground that the relator to entitle herself to make the filing should have visited the land in person and should have made of her own knowledge, and not merely upon her information and belief, the representations concerning it to which reference has been made above.

For the Government it will be here contended:

I. That the relator did not comply with the statute.

II. That mandamus does not lie in a case of this kind.

I.

The relator did not comply with the statute.

1. By express provision of section 2 it is the "person desiring to avail himself of the provisions of this act" who is required to file the written statement. All of the matters of proof specified in section 2 are in clearest terms required to be set forth in the statement itself. No additional witness is mentioned. No substitution by agent is allowed. It is entirely manifest that all of the statements of fact for which this statement calls must come from the applicant and be vouched for by his own oath.

As the mere filing of the statement at once results not only in the withdrawal of the land from possible acquisition by others, but also in the acquisition by the applicant of an alienable right (*Williamson* v. *United States*, 207 U. S., 425, 460; *United States* v. *Biggs*, 211 U. S., 507, 520), it was but ordinary prudence for Congress to require beforehand definite and reliable assurance of the existence of these ma-

terial matters upon which the applicability of the statute is made to depend. Some of them, such as the previous surveying of the tract and the absence of any reservation affecting it, are matters ascertainable at once by the local officers from the records of their office and concerning which no other evidence would be in order; but those which are required to be set up in the initial statement are all matters *in pais*, concerning which the register and receiver would ordinarily have no independent knowledge or information whatever. They have to do, on the one hand, with the intent and "good faith" of the applicant, and, on the other, with physical conditions of or upon the land. As respects them all the statute clearly makes the statement the only vehicle of information, and the applicant the only witness competent to subscribe the statement. The law lays upon the applicant alone the duty of supplying this information accurately and honestly, and the importance of the information so to be supplied is gauged not only by the aforementioned change in the status of the land which occurs with the filing of the statement, but also by the legal consequences to the applicant himself should the information turn out to be corruptly false, namely, "all the pains and penalties of perjury" and a forfeiture of all moneys he may pay and all rights in the land.

Were the Land Department to accept a statement giving merely the applicant's information or belief that the land is chiefly valuable for timber, and that

it is uninhabited and free from improvements made by others, it would be starting the machinery of this law, segregating the land, and very possibly subjecting *bona fide* settlers and claimants to serious annoyance and injury upon the faith of mere hearsay. The statute nowhere sanctions this.

In *United States* v. *Wood* (70 Fed., 485) the District Court for the District of Oregon upheld an indictment for subornation of perjury based upon false allegations in statements filed by applicants under this statute, that they had made personal examination of the land and that it was unfit for cultivation. The court said (p. 486):

> The oath required by the act of congress providing for the sale of these lands contains two parts: One, that the land is unfit for cultivation, uninhabited, and unimproved; and the other, that, to the best of the belief of the applicant, the land contains no valuable deposits of mineral, etc. This last part may be made on information, but the first statement necessarily implies a personal knowledge of the land. The requirement of the department as to the affidavit of personal examination is in conformity with the requirement of the first part of the oath provided by the statute.

The same view was taken in the Circuit Court for the Western District of Wisconsin by District Judge Bunn, in the case of *Hoover* v. *Salling* (102 Fed., 716), a suit in equity brought by a defeated entrywoman to fasten a trust in her favor upon land which she had sought to enter under this act but

which had been patented to a successful contestant before the Land Department. The decree in that case was reversed by the Court of Appeals, whose opinion we shall have occasion to consider.

2. The Land Department has always construed the act as requiring the facts concerning the physical character and condition of the land to be set forth in the statement directly and not upon the mere information and belief of the applicant, conceding, of course, as the statute expressly permits, that no more than his belief need be averred on the subject of minerals. (Circular of Instructions of Aug. 13, 1878, Copp's Public Land Laws of 1875–1882, p. 1456; General Circular of Oct. 1, 1880, Copp, *ibid.*, p. 277 (regulations), p. 302 (form of affidavit); Circular of July 16, 1887, and form of affidavit, 6 L. D., 114, 117; General Circular of Jan. 25, 1904, p. 41; see also 14 L. D., 436; 29 L. D., 653.)

Concerning the force to be attributed to a continuous administrative construction like this, there can be no possible question after the numerous decisions of this court dealing directly with the subject. Unless the construction be clearly erroneous, it should be adopted, even though in its absence the courts might be disposed to construe the statute differently.

United States v. *Moore,* 95 U. S., 760, 763.

Hastings, etc., R. Co. v. *Whitney,* 132 U. S., 357, 366.

United States v. *Hammers,* 221 U. S., 220, 228.

3. The case of *Hoover* v. *Salling* (110 Fed., 43), decided by the Circuit Court of Appeals for the Seventh Circuit, and reversing the decision by Judge Bunn referred to above, appears to afford the only instance in which the correctness of the departmental construction has ever been seriously questioned. Judge Bunn in the lower court, after explaining the position of the department, had given his own views as follows (102 Fed., 719):

> Upon full consideration of the language of the act, I can not say that such a construction is not reasonable. The act specifies in terms wherein the sworn application may be made upon belief. From this circumstance alone it may be inferred that in all other respects the oath should be made from personal examination and knowledge. It was wholly reasonable and proper that in regard to mineral deposits, which would be under the ground, the oath might be upon belief, but as to whether the land was timber land and unfit for cultivation, or farm land and adapted to farming purposes, could be told from personal inspection and knowledge. Considering the terms and purposes of the statute, it can hardly be presumed that a person residing in Maine or Florida, a thousand miles away, should be allowed to enter land in Wisconsin under the timber act by taking an oath as to the situation and character of the land upon information and belief, without any personal knowledge of the fact. Again, the act provides that, if any

> person taking the oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury. This, also, would point to the same construction, as it is hardly possible to punish for perjury upon an affidavit made on information and belief. A contemporaneous construction placed upon the act by the land department, whose business it was to administer the law, and acquiesced in for 13 years, should certainly have great weight with the court, and should not be disregarded, and patents of land by the government set aside, except for the strongest reasons and upon clear and palpable grounds. *Orchard* v. *Alexander,* 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737; *Caha* v. *U. S.,* 152 U. S. 211, 14 Sup Ct. 513, 38 L. Ed. 415; 5 Land Dec. Dep. Int. 483. Upon the whole, therefore, I am of opinion that the regulations of the land commissioner under the statute in question are reasonable, and fairly calculated and intended to carry into effect the intent and meaning of the act of congress.

In the opinion of the higher court, expressed by Judge Grosscup, the construction of the department was held to be "clearly wrong" and was set aside in favor of the loose construction contended for by the present plaintiff in error.

The reasoning which led to this result begins with an exegesis of the purpose of the statute. The opinion here reads (110 Fed., 45):

> It was based manifestly upon the possibility that much of the timber and stone on

> these lands would not be needed for years to come, though, with the passage of time, their value would increase; and it was meant that the opportunities thus afforded for increased valuation should not be monopolized by a few, but should be open equally to all, so that the increment, whatever it was, might be shared widely by the people of the United States. The act was, in a sense, an attempt to widely distribute and popularize the ownership of these lands.

In other words, the act was not designed, as has been generally supposed, to supply the needs of timber and stone which were increasing with the rapid development of the country, but rather to bring about a distribution of this property among the limited and favored class of persons who could afford to pay for the lands and hold them indefinitely and intact to await the unearned increment of the future. The court does not point out the language in the act which justifies this conception of its purpose. The opinion shows, however, that the conception was really of controlling force, for the court, ignoring the fact that the statute undoubtedly requires the applicant to go to the land district where the lands are, to make oath to the statement before the register or receiver, immediately deduces the proposition that Congress could not be conceived to have had any intention to "shut out" from the benefits of such investments citizens living at a great distance from the land, or

who, for other reasons, were unable to inspect it personally; and the latter proposition is in turn employed in the process of converting the sworn statement required by section 2 into a mere petition "upon which the machinery of the land office is to be set in motion"; something akin to a pleading, alleging material facts to be proven later, but not to be taken in any sense as evidence itself. The next and last step in the argument is to apply to this pleading the rules which commonly govern verified pleadings in the courts, requiring those facts which may be supposed to rest peculiarly in the personal knowledge of the pleader to be stated directly, but permitting those which do not to be averred upon his information and belief.

It is submitted that the real purpose of the statute was misconceived. The court should have sought the purpose in the language, instead of assuming a purpose to add to and control the language. Congress expressly allowed the sworn statement to be based on belief only, so far as it respected the mineral character of the lands. The significance of the fact that the same liberality was not accorded in other respects is not considered in the opinion. The court also misapprehended the effect of the statement in conferring new rights upon the applicant and changing the status of the land. (*Williamson* v. *United States,* 207 U. S., 425; *United States* v. *Biggs,* 211 U. S., 507, 519.) But perhaps the most striking feature of the opinion

is seen in this, that it resorts to a series of difficult and apocryphal propositions to prove that the Land Department was "clearly wrong."

After all, the decision which we have been discussing is best answered by the opinion of the Court of Appeals in the case at bar. The court said (R., 21):

> With the greatest respect for the learned court, from whose opinion we have quoted, we are nevertheless constrained to say that we are not impressed with the soundness of its reasoning. We can not regard the presentation of the verified application as a mere initial paper in the form of a pleading setting forth facts thereafter to be established upon hearing. It is rather in the nature of "preliminary proof" as called in *Williamson* v. *U. S.* (207 U. S., p. 459). As indicated in that case, there are two stages of hearing, the preliminary one after which notice is published, and the second, or final one after publication. This preliminary proof is the essential step by which the applicant secures preemption. It is important as well as reasonable that such proof should be positive and direct in order to secure a preference over other applicants. While this proof is not made sufficient to warrant the issue of the patent, and must be followed by publication and supported by other satisfactory evidence that the land is of the character contemplated, that is to say, unoccupied, without improvements, unfit for cultivation, and valuable chiefly for timber or stone, it is suffi-

cient as to other material facts, namely, that the application is made in good faith for the exclusive benefit of the applicant, and that he has not, directly or indirectly, made any agreement or contract by which the title he might obtain should inure to the benefit of any other person than himself. As to these, the preliminary proof is all that is required by the statute, and the land department has no power to require more. *Williamson* v. *U. S.*, 207 U. S., 425, 460.

We regard the analogy of the procedure under this statute as rather with those special statutory proceedings which are required to be supported by affidavit than with the ordinary procedure in accordance with the equity rules. In the procedure of the first kind providing for the issue of attachments, temporary injunctions, etc., the required affidavit may be separate, or by way of verification of initial pleading; but in either case, the facts must be alleged as within the personal knowledge of the party, and not upon information and belief.

Robnett v. *United States* (CCA., 9th Circuit), 169 Fed. 778, follows *Hoover* v. *Salling* to the extent of holding that the express statements that the applicant has personally examined the land and has personal knowledge concerning it, which the statute does not in terms require, can not be made the basis of a perjury prosecution under section 2. It does not decide that a statement made on mere information and belief would be a compliance with that section.

II.

Mandamus does not lie in this case.

The Court of Appeals (R., 19) disposes of this proposition in a very few words, as follows:

> * * * it is sufficient to say that this is not the case of one seeking to establish a title to lands as against the United States, but of one seeking to compel the performance of a ministerial duty imposed upon the officer by the terms of a statute. The duty, if such, does not cease to be ministerial because it requires, in some degree, the construction of the language of a statute. *Roberts* v. *Valentine*, 13 App. D. C., 38, 46; *Roberts* v. *U. S.*, 176 U. S., 221, 231.

From the lack of any further explanation and from the fact that no authority other than the *Roberts* case is cited, it is evident that the " duty " which the court had in mind and regarded as ministerial was the duty to receive and file a paper, namely, the sworn statement, if it conformed to the statute. That such a duty, considered apart, would be ministerial is beyond question. The grave misconception was in asuming that this was the only or the principal duty which the law itself devolved upon the Secretary in the premises. His chief duty lay before the act of filing, and was the duty, imposed upon him as guardian of the public domain, of deciding whether the statement complied with the law. This was not ministerial, but highly judicial. It was not collateral or merely incidental, but primary and direct. A brief consideration of the

Roberts case, in contrast with the case of *United States* v. *Black* (128 U. S., 40), will serve to bring out this principle of distinction which differentiates the former entirely from the case at bar. The *Roberts* case involved an act of Congress which specifically made it the duty of the Treasurer to pay over certain interest money on certain certificates which had theretofore been " redeemed." The relator claimed interest on account of some of the certificates which had been redeemed, not directly, but by payment of a judgment first secured thereon in the Court of Claims. The only question confronting the Treasurer was whether the certificates, having thus been paid by satisfaction of the judgment, had been " redeemed " within the meaning of the act. This court held that they had, and found the construction of the act " quite plain and unmistakable," and that the duty of the Treasurer, which was specifically enjoined upon him by this one statute, was " at once plain, imperative, and entirely ministerial " (p. 230). It reaffirmed, however, the case of *United States* v. *Black* (128 U. S., 40), and pointed out in the following language the difference between that case and the case in hand:

> This case comes within the exception stated in the *Black case*, that where a special statute imposes a mere ministerial duty upon an executive officer, which he neglects or refuses to perform, then mandamus lies to compel its performance; but the court will not interfere with the executive officers of

the Government in the exercise of their ordinary official duties, even when those duties require an interpretation of the law, the court having no appellate power for that purpose. On this last ground the court denied the writ.

Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. (*Ibid.*)

The facts of the *Black* case were these:

The relator had applied to the Commissioner of Pensions for an increase of pension to which he claimed to be entitled under the law upon a certain state of facts. The commissioner found the facts as alleged, but held that under the acts of Congress

they did not authorize the increase. Mandamus was refused. From the opinion by Mr. Justice Bradley, reviewing many previous decisions, we quote the following (p. 48):

> The court will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them.
>
> Judged by this rule the present case presents no difficulty. The Commissioner of Pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the Secretary of the Interior, as evidenced by his signature of the certificate. Whether if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate power over the Commissioner, and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions. They were by no means merely ministerial acts.

Now the really vital difference between these two cases is certainly not to be found in the fact that there was but a single statute to be construed in the one while there were several in the other; judgment and discretion were required in both cases to arrive at the statutory meaning. Neither can it lie in the circumstance that in the one case the statutory meaning was more plain and in the other less so. There is, of course, the principle (itself decisive of this case) which forbids relief unless the duty sought to be enforced be plain and positive; it must be clearly prescribed and enjoined by the law. (*Merrill on Mandamus*, sec. 57; *International Contracting Co.* v. *Lamont*, 155 U. S., 303, 308; *Ex parte Cutting*, 94 U. S., 14, 19; *Redfield* v. *Windom*, 137 U. S., 636, 644.) But that is a principle quite independent of the rule relating to acts of discretion, and rests upon different grounds. The existence of a duty may be doubtful, and yet there may be no doubt that, conceding its existence, it would be ministerial; and, on the other hand, a duty may be plain, and yet admittedly discretionary; in neither case should a performance be coerced and dictated by mandamus. The distinction between the two cases which resulted in the granting of the relief in the one and in refusing it in the other was simply this: In the *Roberts* case the question which the court was asked to decide—a question of law—was not under the circumstances a question the decision of which was in a direct or special way confided to the Treasurer by law. He was specifically directed to

pay the interest on the certificates which had been redeemed. The question of law arose in a preliminary and purely incidental way, just as such questions must inevitably and continually confront all officials in the performance of duties which are entirely ministerial—just as they arise constantly to confront the citizen in his everyday life. They must be solved, and judgment and discretion will be demanded for their proper solution. But neither the ministerial officer nor the citizen is specially selected by law to decide them, though the law expects both to ascertain and obey. In the *Black* case we find a very different situation. The Commissioner of Pensions, in passing upon and allowing or disallowing pension claims, is obliged to decide a host of legal questions. The effect of the statutes is to compel this. It is a necessary part of his regular duties, demands discretion always, and what is particularly to the point here, demands *his* discretion. He is picked out and designated by the law itself to exercise the function of deciding questions of law. The law makes him the arbiter in the first instance. The courts may no more exercise this function for him through mandamus than one court may thus decide law questions depending in another.

The case at bar is precisely analogous to the *Black* case. The Secretary of the Interior as the head of the Land Department is compelled to decide a multitude of legal questions in administering the complicated land laws. It may be said that in practically every one of the innumerable cases com-

ing before his department in which, with or without contests, are involved the rights of parties to acquire titles or interests in the public lands, legal propositions of greater or less difficulty are presented which must be decided in order that those rights may be determined. This court, indeed, has repeatedly said that the department is a special tribunal constituted by law for the express purpose of administering the statutes relating to the disposition of the lands and therein of deciding all questions and controversies arising under them.

> *Knight* v. *Land Association,* 142 U. S., 161, 181.
>
> *Riverside Oil Co.* v. *Hitchcock,* 190 U. S., 316, 324.

In a word, then, the two kinds of cases are to be discriminated in this way: In the one (e. g., *Roberts* case), the very purpose of the law involved is to direct the conduct of the official to the performance of some specific thing; the command is *for him;* if he disobey it he is a lawbreaker. In the other (e. g., this case), the law makes a rule for third persons and constitutes the official a judge to pass upon the degree of their performances. If he decide wrongly upon a misconception of the rule, he has merely committed a judicial error.

Riverside Oil Co. v. *Hitchcock, supra,* is absolutely in point. That was mandamus to compel the Secretary of the Interior to reinstate certain rejected lieu selections and issue patents thereon.

The questions involved were purely legal. This court said (p. 324):

> In *Decatur* v. *Paulding*, 14 Pet. 497, it was held that, in general, the official duties of the head of one of the executive departments, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the Government in the administration of the various and important concerns of his office is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress under which he is from time to time required to act.
>
> That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior

> to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility as well as the power rests with the Secretary, uncontrolled by the courts.
>
> *Kimberlin* v. *Commission,* 104 Fed., 653.
> *Brown* v. *Hitchcock,* 173 U. S., 473, 476.
> *Oregon* v. *Hitchcock,* 202 U. S., 60, 68.

Authorities like *Garfield* v. *Goldsby* (211 U. S., 249), *Noble* v. *Union River Logging Railroad Co.* (147 U. S., 165), and *American School of Magnetic Healing* v. *McAnnulty* (187 U. S., 94) have no possible application here. In each of those cases the action complained of was *ultra vires*—entirely beyond the scope of the authority of the official performing it, and tended, in addition, to destroy or injure vested property rights.

An action of this kind approaches closely, if indeed it be not clearly in principle, an action against the United States (*Oregon* v. *Hitchcock, supra; Louisiana* v. *Garfield,* 211 U. S., 70; *Conley* v. *Ballinger,* 216 U. S., 84).

The action was properly dismissed, but the dismissal should have been based expressly on the want of jurisdiction.

Respectfully submitted.

ERNEST KNAEBEL,
Assistant Attorney General.

OCTOBER, 1911.

○

Supreme Court of the United States.

OCTOBER TERM, 1911.

UNITED STATES *ex rel.*, MARY S. NESS,
Plaintiff in Error,

vs.

WALTER L. FISHER
(Substituted for RICHARD A. BALLINGER),
Secretary of the Interior.

In Error to the Court of Appeals of the District of Columbia.

STATEMENT OF CASE.

This is an action brought in the Supreme Court of the District of Columbia for the issuance of a writ of mandamus to compel James Rudolph Garfield, then Secretary of the Interior (succeeded first by Richard A. Ballinger, and later by Walter L. Fisher, the present defendant in error), to accept the timber and stone application of the plaintiff for one hundred and sixty acres of vacant public land situated in the State of Oregon, under the act of June 3, 1878 (20 Stat., 89), entitled "An Act for the sale of timber lands in the States of California, Oregon, Nevada and in Washington Territory".

The plaintiff alleged that she had accompanied her said application with an affidavit setting forth that the application was made in good faith and to appropriate the land to the applicant's exclusive use and benefit; that she has made no other application under said act; that she had not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title which she might acquire from the government would inure, in whole or in part, to the benefit of any person except herself; further, *upon information and belief*, that said land was unfit for cultivation and valuable chiefly for its timber, was uninhabited, contained no mining or other improvements or any valuable deposit of gold, silver, cinnabar, copper or coal, or other mineral or deposit of salt; that she had not personally examined the land because physically unable to do so, also because of the great distance between her home and the land, the inaccessibility thereof, the dense amount of underbrush necessary to be passed to reach it, the lack of any wagon road leading thereto, and the fact that she was encumbered with a small baby. She also filed therewith an affidavit of her agent, an expert woodsman, who had personally examined the land and testified as to its character from personal knowledge.

She further showed that this application was rejected by the Register and Receiver of the local land office, also on appeal by the Commissioner of the General Land Office, also on further appeal by ex-Secretary Garfield of the Interior Department, and on motion for review by said Secretary, for the sole and only reason that the applicant had not personally examined the land before filing said application.

To respondent's return to the notice to show cause demurrer was filed and sustained and the writ ordered to issue. Upon appeal by Secretary Garfield, the Court of Appeals

of the District of Columbia reversed the decision of the lower court and ruled that the regulation prescribed by the Secretary of the Interior under the said act of 1878, namely, that every applicant must have personally examined the land prior to filing application, is not in conflict with or in excess of the power conferred by the statute (37 Land Dec., 583).

Thereupon the plaintiff came to this Court on writ of error.

The act of June 3, 1878, commonly known as "the timber and stone law", in so far as it is of importance in this case, is as follows:

"SEC. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belonged to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States would inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject

to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

"SEC. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in this case, a patent shall issue thereon: *PROVIDED*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office."

The provisions of this statute were by Section 2 of the Act of August 4, 1892 (27 Stats., 348), made applicable to "all the public land States".

POINTS OF ARGUMENT.

I.

That the Interior Department regulation here involved is unauthorized and illegal. (Morrill *vs.* Jones, 106 U. S., 466.)

II.

That such regulation is destructive of rights conferred by act of Congress (Adams *vs.* Church, 193 U. S., 509; Williamson *vs.* United States, 207 U. S., 425).

III.

That the construction of the law made by the Interior Department has not been uniformly followed by that Department, and is therefore not within the rule that such construction is entitled to the most respectful consideration.

IV.

That the ruling of the Department has completely disregarded the decision of the United States Circuit Court of Appeals for the Seventh Circuit, and the more recent decision of the Circuit Court of Appeals for the Ninth Circuit (Hoover *vs.* Salling, 110 Fed. Rep., 43; United States *vs.* Robnett, 169 Fed. Rep., 778).

V.

That the construction of the law contended for by appellant and sustained by said decisions of the Federal Courts would not result in making difficult a conviction for perjury under the timber and stone law.

VI.

That there is an anology between the preliminary statement under this act and the initial pleading in a court of chancery, which may be sworn to on information and belief.

ARGUMENT.

THE TIMBER AND STONE LAW DOES NOT REQUIRE, EITHER DIRECTLY OR INDIRECTLY, THAT AN APPLICANT THEREUNDER SHALL HAVE PERSONALLY INSPECTED THE LAND.

The law merely provides that he shall have declared by affidavit that the land is unfit for cultivation, valuable chiefly for timber or stone, uninhabitable, etc. If the law-making body had intended that the applicant should first have examined the land personally it would have inserted a provision to this effect. Having failed to enact it, the Interior Department is surely exceeding the power conferred upon it to make regulations, when it prescribes such personal examination.

It has been argued by the Department and is held by the lower court, that because the provision as to there being no valuable mineral deposits on the land is preceded in the act by the words "as deponent verily believes", this indicates that the remaining portions of the affidavit must be upon

personal knowledge. Such, however, does not follow, as these words merely have reference to the fact that valuable mineral deposits would be beneath the surface of the ground, consequently their existence or non-existence could not be readily ascertained, wherefore it necessarily becomes a matter of belief for whomsoever inspects the land.

We urge that a provision in Sec. 3 indicates with far more exactness the intent of Congress in enacting this statute. That is the provision that the applicant shall after making due publication "furnish to the register of the land office *satisfactory evidence* * * * that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal". It is evident from this that Congress considered the application mentioned in the first section to be a mere preliminary paper or statement on which the machinery of the land office is to be set in motion. The statement is, so far as the character of the land is concerned, not accepted as proof and does not perform the office of proof: that must come later at the hearing when "satisfactory evidence" is required. Under this section of the law the Interior Department has always until recently required the evidence of two witnesses besides the applicant himself, given in response to numerous detailed questions as to the character of the land, the non-existence of improvements, etc. Thus the words "satisfactory evidence" are used in the third section in contradistinction to the words "written statement" in the second section, and the said preliminary statement should not therefore be held to take the place of evidence.

By its decision in the case of Morrill *vs.* Jones (106 U. S., 466), the Supreme Court held that under a law providing for the admission, duty free, of live animals especially imported for breeding purposes, a regulation directing that

the collector must be satisfied the animals are of superior stock, was unauthorized: for "the Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. * * * *This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe.* * * * In our opinion the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of the Treasury regulation". (Underscorings are ours.)

In Adams *vs.* Church (193 U. S., 509), this Court held that a regulation adopted by the Interior Department requiring that an entryman under the timber culture law shall make oath that he has not alienated any interest in the land, is unauthorized and invalid, such prohibition being "not found in the statute nor required by the policy of the law upon the subject".

Again in Williamson *vs.* United States (207 U. S., 425, 462), the Court ruled that the regulations of the Interior Department requiring that on submission of final proof a timber and stone applicant must swear that he had not alienated the land was likewise invalid and no conviction for perjury could be secured thereon. Referring to the authority conferred by Section 3 upon the Commissioner of the General Land Office to issue regulations, the court held that "this power must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to authorize him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred."

To the same effect is the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of Hoover *vs.* Salling (110 Fed. Rep., 43), to which we shall refer hereinafter.

THE DEPARTMENTAL REGULATION OPERATES TO DESTROY RIGHTS CONFERRED BY AN ACT OF CONGRESS, AT LEAST TO THE EXTENT OF A LARGE PORTION OF THE POPULATION.

The timber and stone law was enacted not for the benefit of a few citizens only, but broadly for "any person desiring to avail himself of the provisions of this act". But the regulation issued by the Department thereunder results in confining the benefits of the act to the strong, the well and the financially able, and in most instances to those living in the immediate vicinity of the lands desired.

As held by the Circuit Court of Appeals in the Salling case (*supra*):

"It will be noted that the statute requires no residence upon the land by the applicant, either at the time, or subsequently; nor does it require him, either presently, or in the future, to utilize the land, by either cutting the timber, or quarrying the stone. There is in the statute no purpose nor requirement, in these respects, such as the homestead laws embody.

"The purpose of the act seems to have been of an entirely different character. It was based manifestly upon the possibility that much of the timber and stone on these lands would not be needed for years to come, though, with the passage of time, their value would increase; and it was meant that the opportunities thus afforded for increased valuation should not be monopolized by a few, but should be open equally to all, so that the increment, whatever it was, might be shared widely by the people of the United States. The act was, in a sense, an attempt to widely distribute and popularize the ownership of these lands.

"We cannot conceive that Congress meant, in the promotion of such a purpose, to shut out citizens of the United States who lived at great distances, or were physically incapacitated to explore the woods, or citizens who, for any reason, could not personally inspect the lands. The invita-

tion was to all, wheresoever they resided, and whatsoever their means of acquiring information, who could comply with the procedure laid down by the statute."

We submit that this reasoning is eminently correct and that the statute cannot be logically construed in any other manner.

It is true that the law requires that the preliminary statement shall be sworn to before the Register or Receiver of the district where the land is situated. To that extent the rights of citizens throughout the entire United States are limited, but the Interior Department has not the right to enforce further limitation. Some of the States, as for instance Florida, Alabama, Mississippi, Louisiana, Missouri, Michigan, Wisconsin, Nevada and Arizona have each only one land district within the entire State. Many of the other States have only a few districts, and some of these are several hundred miles in extent. The citizens of the land office towns and others in the near vicinity should have the right to enter timbered lands anywhere within the limits of these districts (or anywhere within the limits of the States above enumerated), without being required to travel hundreds of miles to personally inspect the desired tract of land before even filing application for it. Thus a citizen of Marquette, Michigan, should not be required to cross a chain of mountains and a part of the great lakes, then to follow a most laborious and almost inaccessible trail, in order to file preliminary statement for a tract of timber land on the upper Peninsular, which Congress declared should be open to all the citizens of the State. Likewise a citizen of Carson City, Nevada, who wishes to enter a tract of stone land in the extreme southern portion of the State, should not be obliged to travel four hundred miles across the desert to inspect that land before being allowed to file application and purchase it

from the government. Nor should a citizen living in the vicinity of neither land nor land office be compelled to visit both before initiating his right of purchase. Such a ruling is manifestly destructive of statutory rights and should not be sanctioned by the Courts.

The regulation is especially unwise and unjust as applied to the facts in the present case. For the land here involved there was a woman applicant, who while possessing every qualification required by statute had not the physical strength to travel over the rough mountain trail and to the high altitude where said land was situated, especially as she was nursing an infant. She furthermore showed that she had not sufficient knowledge of land values to determine upon personal inspection whether the land was chiefly valuable for timber and stone and was unfit for cultivation. She therefore hired a competent woodsman possessed of this knowledge and upon information supplied by him, also upon his affidavit, she swore on information and belief that the land was of the prescribed character. It is urged that such evidence as this is of a better character than what would have been supplied by her own affidavit had she been physically able to reach the land.

The holding of the Circuit Court of Appeals in the Salling case is hence peculiarly applicable here, to wit:

"We hesitate, of course, to interpret a statute contrary to the construction put upon it by the Interior Deparment, and to the rules and regulations adopted by the Department to carry out its provisions; but when the construction of the Department is clearly wrong, and its rules and regulations have the effect of distinctly changing rights created under the statute, amounting to a denial to the appellant of one of her rights, the occasion for hesitation ceases. Morrill *vs.* Jones, 106 U. S., 466, 1 Sup. Ct., 423, 27 L. Ed., 267.

"We are of the opinion that the rules and regulations of

the Department, as applied to the case under consideration by the land office, and upheld by the Circuit Court, have had the effect of depriving the appellant of one of her rights under the law, and are, therefore, in that respect, contrary to law and erroneous."

THE INTERIOR DEPARTMENT HAS NOT BEEN UNIFORM IN ITS CONSTRUCTION OF THE LAW, NOTWITHSTANDING THE FINDING MADE BY THE D. C. COURT OF APPEALS.

Although the Interior Department has contended in the present case, and the Court below has found, that this construction of the timber and stone law has been uniformly followed for a number of years, the reported decisions of that Department show the contrary.

Thus in the case of Mary E. Gardner (16 L. D., 560), it was found that applicant had not inspected the land prior to filing her sworn statement, but did examine it two weeks before making final proof. The General Land Office thereupon rejected her proof and held her entry for cancellation, but upon appeal the First Assistant Secretary ruled that as she had stricken from her sworn statement, the words "I personally examined said land," she had not misled the Department, wherefore her entry should be allowed to go to patent.

In the case of Theressa McManus (29 L. D., 653), Secretary Hitchcock, in a decision prepared by Assistant Attorney-General Van Devanter, called attention to a number of cases in which entry had been allowed and the land passed to patent, where the person making the entry had not personally made an examination of the land. So many of these entries were allowed by the local land office at Duluth, Minnesota, that special instructions were issued by the Department to that office.

It thus appears that the Interior Department has not been uniform in its construction of the statute, but has in some instances permitted the making of entries by and the issuance of patent to those who had not personally examined the land entered.

Furthermore, although its regulations issued under the timber culture law (20 Stat., 113) provided that the preliminary affidavit should set forth personal examination of the land by the applicant, Secretary Vilas in 1889 (8 L. D., 20), held that as the statute did not contain these words or this requirement "the said phrase should therefore be stricken out of the said affidavit." The same ruling should have been made under the timber and stone law, passed by the same Congress, especially after the Courts had construed that law contrary to the construction made by the Department.

Even if, however, the construction made by the Interior Department be "entitled to the most respectful consideration and ought not to be overruled without cogent reasons", as maintained by the D. C. Court of Appeals, we urge that such reasons are to be found in the present case. The Supreme Court found in the Williamson case such reasons with regard to the final proof under the timber and stone act, and in the Adams-Church case with regard to the proof under the timber culture law. Equally as cogent reasons exist with respect to the preliminary statement under the timber and stone act.

So in the case of Lewis *vs.* Shaw (70 Fed., 289), the Circuit Court for the District of Washington held that a statement in the printed form used for timber and stone entries, to the effect that applicant was a citizen of the United States, was not required by law, as the same applied also to "persons who have declared their intention to become such."

Further, as the Circuit Court of Appeals stated in the Salling case, while the courts hesitate to interpret a statute contrary to the construction put upon it by the Interior Department, yet the cause for hesitation ceases when the latter construction is clearly wrong and the Departmental regulations have the effect of denying rights created by the statute.

THE INTERIOR DEPARTMENT HAS DELIBERATELY REFUSED TO FOLLOW THE OPINION OF A FEDERAL COURT UPON THE POINT INVOLVED.

In the case of Hoover *vs.* Salling (*supra*) the question of whether an applicant for timber and stone land should first personally inspect the tract applied for was directly involved, the Interior Department having canceled the entry of complainant because of such failure to inspect, and having issued patent upon a later entry to the assignor of respondent. A bill in equity was filed to secure a decree that the title of the land was held in trust for the complainant. Upon demurrer the Circuit Court dismissed the bill, but upon appeal the Circuit Court of Appeals through Judge Grosscup reversed the opinion below.

The case was not appealed to the Supreme Court, but it is submitted that in the absence of such appeal, the Interior Department should have accepted and followed the construction placed upon the law by the Circuit Court of Appeals. The matter was repeatedly brought to its attention, but the Department in the Featherstone case (32 L. D., 632) ruled that "such decision while highly persuasive has not been accepted as authority for changing the requirement of the Department in this respect." So it likewise ruled in rejecting the application of Mrs. Ness.

It is earnestly submitted that, while the Department is vested with authority to construe statutes where the Federal

Courts have not construed them, it should be required to follow the direct interpretation of a law made by the Federal Courts.

In the later decision rendered by the Department on this same point, it has relied upon the decision of the District Court in the case of United States *vs.* Wood (70 Fed. Rep., 485, 486). That, however, was the opinion of an inferior court to the Circuit Court of Appeals and should not have been followed after the ruling in Hoover *vs.* Salling was announced (if, indeed, the Department ever relied upon it before, or considered it necessary to do so). Furthermore, in that case the question arose on an indictment charging perjury in an affidavit alleging personal examination of the land, and the point was made that the averment was immaterial. While the court overruled this point, the fact remains that the defendant *had* taken the oath in question and *had* sworn falsely. If the point had come to the Court in a different form, on behalf of one who had *refused* to subscribe to the affidavit, as it did to the Court of Appeals in Hoover *vs.* Salling, we apprehend that the decision of the District Court might have been different.

Moreover, the opinion of the Circuit Court of Appeals above mentioned has been followed in the more recent case of Robnett *vs.* United States (169 Fed. Rep., 778). Therein the defendant was charged with perjury in his preliminary statement and was found guilty, but upon appeal to the Circuit Court of Appeals for the Ninth Circuit, it was held that under the Supreme Court ruling in the Williamson case (207 U. S., 425), neither personal examination of the land by Robnett nor his personal knowledge concerning it was required, and hence that the indictment charged no crime against him.

Thus two United States Circuit Courts of Appeal have ruled contrary to the opinion of the District of Columbia

Court in the Wood case and in one of these instances the question at issue was precisely the same as in the Wood case.

THE DEPARTMENTAL CONSTRUCTION OF THE LAW WOULD HAVE NO EFFECT UPON INDICTMENTS FOR PERJURY.

The main argument advanced by the Interior Department and accepted as satisfactory by the District of Columbia Court of Appeals is to the effect that the construction of the law contended for by appellant would result in making it exceedingly difficult to secure conviction for perjury on the ground of false statements in the preliminary application.

We urge, however, that if an applicant's agent should swear falsely to the character of the land he could be indicted and convicted under Sec. 5392 U. S. R. S., which covers "every person who having taken an oath before a competent officer or person, in any case in which a law of the United States authorizes an oath to be administered." Sec. 2 of the act of 1878 certainly authorizes the administration of an oath.

Furthermore, the applicant himself could be convicted of perjury upon his statement upon information and belief secured from the agent (duly named by Mrs. Ness in the case at bar), that the land was uninhabited, etc. He could likewise be convicted of subornation of perjury for having the agent execute such an oath, for it is evident that the agent would not swear falsely in order to further the claim of the principal, without being paid by or having some illegal agreement with the principal.

While there is no agent mentioned in Sec. 2 of the act, it is likewise true that no agent or witness is mentioned in Sec. 3, yet the Department for nearly thirty years required the testimony of two witnesses besides the claimant on the

final proof and printed at the bottom of the blank form for each witness the full text of Section 5392 U. S. R. S. and likewise the following note:

"In addition to the above penalty every person who knowingly or wilfully in any wise procures the making or presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment."

Surely the contentions of the Department in the present case are inconsistent with its forms under the act in question.

The same objection was raised in the case of Kerr *vs.* Philips (2 S. Car. Law Reports, 197, 200), in which the Court held that an affidavit required of a party or his agent might be sworn to on information and belief. Said the Court therein:

"It is objected that the affidavit must be such as perjury may be assigned on. This is conceded, but perjury may be assigned on the affidavit 'that he is informed and believes,' as well as where he swears positively to the truth of the fact. In neither case would mere disproof, as that the defendant did not know of the debt, be sufficient, but the oath must be wilful and corrupt. Nor do we consider there is anything in the objection that a plaintiff who is unwilling to incur the risk of making a false affidavit, may employ a bolder agent to swear to his belief founded on information derived from the plaintiff himself. The thing is possible, but such an unscrupulous plaintiff would not, in general, hesitate to make a sufficient affidavit himself. The rules of law cannot be framed to guard against possibility of evil, and if such a plaintiff and agent are to be found, the end would be readily obtained by swearing that a debt once existed and to his belief that it was still unpaid, which according to the cases above quoted would be sufficient."

So we urge here, that were a timber and stone applicant

unscrupulous enough to employ an agent knowing that the latter would swear falsely as to the character of the land, he would doubtless be bold enough to make the same allegation from his own knowledge and thus dispense with both the cost of a confederate and the greater probability of detection.

Furthermore, there would be no object in committing perjury with respect to the declaratory statement, since such statement confers no title to the land nor even an equitable claim (Campbell *vs.* Weyerhaeuser et al., 161 Fed. Rep., 333). The Department in numerous decisions has also held that the mere filing of a timber and stone application gives no right to the land, to the extent of preventing the attachment thereto of an order of withdrawal by the Secretary of the Interior (Board of Control *vs.* Torrence, 32 L. D., 472; Charles O. Deland, 36 L. D., 18).

There would be no advantage gained by filing such an application, because publication of notice must be made immediately thereafter and failure to submit proof on the day advertised results in the loss of all right and claim whatsoever (M. Edith Curtis, 33 L. D., 265; Joseph L. White, 33 L. D., 285). It is not to be apprehended that in order to secure only a partial segregation of a tract of public land for two months, an applicant will deliberately commit perjury or suborn the commission thereof.

In this connection it is to be noted that the Interior Department is not so anxious to secure such conviction as would appear from its contentions in the present case, for by the amended regulations approved by Secretary Garfield on November 30, 1908, and since administered by the Department without change, the testimony of the corroborating witnesses on final proof has been eliminated, likewise the many questions asked the entryman; and in place thereof we

have a short affidavit by the applicant and a mere statement by an appraiser, which statement is not under oath or otherwise verified (37 L. D., 289, 304, 307). The evident object of the change is to secure as much money as the land can possibly be made to sell for, rather than to assure its being of the character required by the Act, or to render easier the committing of applicants and their witnesses to the penitentiary.

Conceding, however, that there is merit in the Department's objection, it is yet urged that a somewhat greater difficulty in proving the crime of perjury should not be allowed to outweigh in the scales of justice a deprivation to a large body of citizens of the United States of a right conferred upon them by Congress. This right has been denied a substantial majority of citizens of the western States for many years by reason of the regulations of the Department, and we submit such practice should no longer continue, though the Department of Justice should be slightly handicapped in securing the conviction for perjury of an applicant for timber and stone lands—it being conceded that there would be no trouble in securing a conviction of the witnesses on final proof if they testified falsely.

We respectfully submit that this case should not be decided as one involving the difficulty or facility of proving a crime, but rather as one involving a Departmental regulation changing the terms of a law and depriving many citizens of rights granted them by statute.

THE PRELIMINARY STATEMENT IS ANALOGOUS TO THE INITIAL PROCEEDINGS IN A COURT OF CHANCERY RATHER THAN TO THOSE UNDER SPECIAL STATUTORY PROCEEDINGS.

The District of Columbia Court of Appeals has refused to accept the following reasoning of the Circuit Court of Appeals for the Seventh Circuit in the Salling case, to wit:

"This procedure embraced, first a statement, verified by oath, of the character of the lands, the right of the applicant to enter, and the purpose of his proposed entry; and then, after notice, a hearing, either ex parte or upon contest—but in either event a hearing—at which, and before allowance of the application, the statement must be supported by satisfactory proof. It is clear to us, in view of this, that the statement is meant simply as an initial paper—the claim or pleading—upon which the machinery of the land office is to be set in motion. The statement is not accepted as proof, and it does not perform the office of proof; that must come at the hearing. It is in the nature of a petition to the land department, setting forth all the material facts upon which action is invoked, and is, in this general respect analogous to verified petitions, or bills, in courts of chancery.

"It is common knowledge that, while many initial pleadings in a court of chancery, in cases where verification is required, must be verified upon the personal knowledge of the petitioner, many others may be verified on knowledge acquired through information, accompanied by bona fide belief upon the part of the petitioner. The distinction depends upon the nature of the subject-matter, and of the relief asked. If the application is such, that the party should, from the nature of his position, or the character of the relief asked, have personal knowledge of the facts set forth, then knowledge through information from others will not suffice. But if the determination of the case depends, not upon what facts were within the personal knowledge of the applicant, but upon the existence of the facts themselves, extrinsic of his personal knowledge; and if the position of the petitioner is such, that personal knowledge on his part cannot be reasonably expected, courts will proceed upon statements founded upon information and belief, though, by statute, there be a requirement that the petition or bill be verified."

The District of Columbia Court relies upon the Supreme Court's ruling in the Williamson case (207 U. S., 459), but to our mind the Williamson decision rather supports the position of the appellant here. It is true the Court therein

held that the preliminary affidavit supplies the only proof necessary upon the fact of the application being filed for the exclusive benefit of the applicant. It does not hold, however, that the preliminary statement supplies proof with regard to the character of the land, this being upon the contrary given by the final proof.

The D. C. Court of Appeals has instead drawn analogy between the procedure under this statute and those special statutory proceedings such as issuance of attachment, temporary injunctions, etc., in which it is held that the preliminary affidavit must be upon personal knowledge and not upon information and belief. Six decisions of the State Courts are cited, which had been relied upon in the brief of the Government below, and which we submit were evidently not carefully considered by the lower court.

In all six cases it was held that the affidavit might be made not only by the party himself, but by his attorney or agent: so that in reality they support our contentions here. Furthermore, in several of them the necessary allegations were those peculiarly within the knowledge of the plaintiff and consequently those upon which he must swear from personal knowledge. In at least two of them there were some previous contrary allegations or certificates which were presumptively correct, and to overcome which it was necessary for the plaintiff to swear positively.

This in Thompson *vs.* Higginbotham (18 Kan., 42, 44), the sheriff in an attachment proceeding had made the return of "no goods," and to overcome this the Court held that plaintiff should have sworn positively from his own knowledge that there were goods belonging to and within the possession of the defendant.

In Gawtry *vs.* Doane (51 N. Y., 84, 89), a notary public had protested a promissory note and sent notice to all parties, his certificate to that fact being under the laws of the

State presumptive evidence unless the defendant should annex to his pleading an affidavit denying the fact of having received notice. The defendant's affidavit making such denial upon information and belief was held to be sufficient because "he knows whether he has received notice or not and no equivocal denial in his affidavit will be sufficient."

So in Neal *vs.* Gordon (60 Ga., 112) the affidavit as to defendant's indebtedness and his residence out of the State was merely on information and belief. Necessarily this was held insufficient as preliminary to the attachment of goods.

In Dyer *vs.* Flint (21 Ill., 80, 83), it was held that the affidavit must be in the words of the statute and should be made by any "creditor, his agent or attorney." But even then the court ruled that "if an agent makes the affidavit his conscience may be relieved by stating his means of knowledge, as by saying 'as appears from his certain note signed by him' or other evidence in the possession of the agent." So in the present case did Mrs. Ness set forth her means of knowledge.

In Lewis *vs.* Connelly (29 Neb., 22), it was held that the affidavit should be on information and belief, yet the Supreme Court concluded that upon finding the affidavit was not in the record, it should have been required afterward by the trial court. From this the conclusion may be drawn that the affidavit required to support a special proceeding is not necessary to confer jurisdiction on the court, but it is in the nature of supplementary proof, and may be made by the party, agent or attorney. Not a single one of these cases provided that the party alone should make the affidavit, as the District of Columbia Court of Appeals has provided in the case at bar.

The court below has evidently overlooked entirely the fact that in her affidavit Mrs. Ness set forth the source of her information and belief, and likewise accompanied it by the affidavit of her agent, an expert woodsman, executed upon personal knowledge.

We submit that the true rule is that laid down in American Carpet Lining Company *vs.* Chipman (146 Mass., 389), to the effect that where the statute requires that the petition shall contain a statement of facts and the nature of the claim "verified by oath," an affidavit made upon information and belief is sufficient. "The cases in which it has been held that, where an affidavit must by statute have been made by some person described, who from the nature of his position had or should have had actual knowledge of the facts testified to, it was not sufficient that the verification should be according to the best knowledge and belief of affiant, do not govern the case at bar."

So in O'Neill *vs.* Glover (5 Gray, 144, 156), where a statute providing that "any of the creditors may apply by petition stating the facts and the nature of such claims verified by oath" was under consideration it was held that the affidavit might be made by the attorney for the creditor, as such petition is not to be received as evidence and constitutes ground only for a notice to the debtor; that "where the subject matter for the action of a judicial tribunal is exclusively within the knowledge of the party moving for its judgment, or where the law has reposed in such party a personal trust and confidence, the party must petition in person. *But except in cases falling within these principles, and unless the language of the Statute in terms requires it, we see no good reason for the restriction.* On the other hand it is apparent that great embarrassment might result from it." (Italics are ours.)

The present case falls under these latter decisions, because the character of the land desired by a timber and stone applicant is not exclusively within the knowledge of that applicant, nor does the law repose any personal trust and confidence in him. It is immaterial to the government who has knowledge of the character of the land: the real point is, what is that character? The government, like a private vendor of a tract of land, cares nothing for the state of mind or knowledge of the vendee, so long as the land itself is of the character required. The Court of Appeals of the District of Columbia has wholly overlooked this circumstance and has instead decided the case as though it were under the ordinary settlement laws, where the applicant is required by statute to know the character of the land by personal inspection before making application.

Again, on general principles we urge that there is no analogy between a proceeding brought with the object of having the adverse party's goods and chattels taken by attachment, or that party restrained in his business or other activities by preliminary injunction, and a mere application to buy from the government a tract of land for a specified sum of money. In one case serious and irremediable injury might be done by the ill-advised action of the Court, hence the Court must be informed on affidavit executed from personal knowledge. In the other case no such injury could be done, for there is no adverse party, or if there should possibly be such he would be amply protected by the statutory provisions for publication of the notice and posting of the same upon the land, and for final proof, with ample opportunity given for protest or contest. With all due respect to the court below, we urge that it could not seriously have considered this question before finding an analogy between a timber and stone application and a petition praying the issuance of a preliminary injunction.

THE INTERIOR DEPARTMENT'S RULING IS IN REALITY AN ATTEMPT AT LEGISLATION.

The return made by Secretary Garfield to the petition for mandamus in the Supreme Court of the District of Columbia urged that the real object of this proceeding was an attempt to appeal from the Interior Department's decision to the Courts "upon matters by law placed exclusively within the jurisdiction of that Department." This contention was overruled by both the courts below, hence we will not here discuss the question of jurisdiction. But we refer to the contention as illustrating the attitude of the Department in this and similar cases.

The regulation adopted by the Department requiring personal examination of a timber and stone tract by an applicant is in the nature of an attempt to legislate. Because Congress had not enacted such provision in the law and at the same time had not forbidden it, and because the Department thought the provision a wise one, therefore the Department deemed itself clothed with jurisdiction to enact same itself.

As set forth by the Department in its latest reported decision on the question (Frank L. Chambers, 40 L. D., 85): "While the timber and stone act does not in specific terms require such a regulation the same is not inconsistent therewith and would seem to be a reasonable requirement in order to carry out the purposes of the act."

Any requirement is inconsistent with the act which imposes upon the applicant a condition not required by the law, and not necessary in order to hold the applicant to a compliance with the law.

Such requirements as this have caused considerable dissatisfaction with the Government throughout the public land States, and have often resulted in retarding the development of unsettled portions of the country.

The Department has of course adopted this regulation conscientiously and with the view that it would enhance the interest of the government and prevent the commission of fraud, etc. We suggest, however, that if the question of policy is alone to govern, the regulation would tend toward the confining of ownership of the public timber lands to a few persons living in their vicinity, and would make much less difficult the monopolizing of such lands by a lumber trust, than if their ownership is widely popularized in accordance with the evident intent of Congress in enacting the statute.

In conclusion we suggest that the Interior Department is not vested with jurisdiction to change or add to positive statutes in order to further its own policy and that upon the contrary it should merely administer the laws as enacted by Congress.

We respectfully submit that the judgment of the local Court of Appeals, overruling that of the Supreme Court of the District of Columbia, should be reversed and the case remanded.

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